

STATE OF MICHIGAN
COURT OF APPEALS

NABEEL N. HAMAMEH,

Plaintiff-Appellant,

v

MARK N. GILSON, ROBERT GHANNAM,
JEREMY BEAVER, and COMERICA BANK,

Defendants-Appellees.

UNPUBLISHED

November 25, 2014

No. 317232

Wayne Circuit Court

LC No. 11-014351-CZ

Before: GLEICHER, P.J., and SERVITTO and KRAUSE, JJ.

PER CURIAM.

After being duped in a scam investment deal, plaintiff Nabeel Hamameh filed suit against con man Mark Gilson, Gilson's agent Jeremy Beaver, Robert Ghannam (a Comerica vice president who brought Hamameh into the fraudulent deal), and Comerica Bank. Gilson cooperated in the entry of a default judgment against him, but was uncollectable. A default entered against, which the circuit court set aside. The circuit court then summarily dismissed Hamameh's claims against Ghannam, Beaver, and Comerica, concluding that Gilson acted alone.

The circuit court prematurely granted Comerica's motion for dismissal under MCR 2.116(C)(8), as the complaint alleged facts stating a claim upon which relief could be granted. In summarily dismissing Hamameh's claims against Ghannam and Beaver under MCR 2.116(C)(10), the court improperly resolved factual questions and ignored hard evidence supporting Hamameh's claims. Accordingly, we vacate the summary dismissal of Hamameh's claims against Comerica and Beaver. We affirm in part and vacate in part the circuit court's grant of summary disposition in Ghannam's favor. We also affirm the circuit court's decision to set aside the default entered against Beaver and remand for continued proceedings on Hamameh's reinstated claims.

I. BACKGROUND

In 2010, Robert Ghannam, a vice president for international finance at Comerica Bank, asked an acquaintance, attorney Nabeel Hamameh, to represent him in a property deal involving Mark Gilson. After this transaction closed, Hamameh asked Ghannam for investment advice. Ghannam introduced Hamameh to Gilson. Over the next week, Hamameh had several meetings and telephone conversations with Ghannam and Gilson and the trio agreed to a get-rich-quick scheme. Gilson described that his colleague "Lisa" had contacts with several banks and could

arrange huge deals for “pennies on the dollar.” According to Gilson, “Lisa” planned to purchase \$15 million of repossessed high-end vehicles from banks for resale at high prices. Gilson and his investors had the opportunity to front some of that \$15 million figure and share in the profits. Hamameh also was interested in investing in real estate and Gilson pitched a mobile home park deal. Gilson offered Hamameh and Ghannam the opportunity to form a partnership with him for these ventures. On October 22, 2010, Hamameh signed a joint venture agreement (JVA) with Gilson, providing that the three men would each contribute \$350,000 toward their purchase of the automobiles and a mobile home park.

The investment was supposed to yield \$600,000 in one week, but the money did not materialize. Months passed with Gilson swearing that closing was right around the corner. He repeatedly broke promises of cash and cars to repay Hamameh. During this time, Gilson used his “partner” Jeremy Beaver and other victims of his schemes to convince Hamameh to remain in the partnership. In the end, Hamameh emerged with approximately \$10,000. Fox 2 News exposed Gilson as a crafty con man who swindled various individuals out of funds for his “investment opportunities,” and Gilson admitted to his deceit.

A. THE COMPLAINT

Hamameh filed a 76-page, 20-count complaint against defendants Mark Gilson, Robert Ghannam, Jeremy Beaver, and Comerica Bank. In the common allegations, Hamameh alleged that he approached Ghannam as “a banking professional and vice president at Comerica, for investment advice” and investment opportunities, believing that Ghannam’s position gave him access to lucrative, legitimate Comerica-backed transactions. Instead, Ghannam introduced Hamameh to Gilson, portraying Gilson as a successful asset manager.

Between October 19 and 21, 2010, Gilson met and spoke with Hamameh several times and pitched the vehicle and mobile home park deals. Gilson told Hamameh that he needed cash up front because the vehicle purchase transaction would happen quickly. Gilson claimed he had already arranged for a car dealership to purchase some of the vehicles within the week for \$600,000. In response to Hamameh’s inquiries, Gilson advised that banks are willing to take a loss by selling repossessed vehicles in bulk because such assets depreciate quickly and have a limited market. Ghannam “corroborated” Gilson’s description of how the transaction would occur and claimed it was “typical based on his banking experience as a vice president at Comerica.”

The complaint continued that on October 22, 2010, Gilson told Hamameh that Lisa could broker a deal for the sale of the mobile home park, but that each investor would need to contribute an additional \$150,000. By the end of that day, Hamameh gave Gilson a total of \$331,000. Hamameh, Gilson, and Ghannam then arranged to meet to sign the JVA. Ghannam was not at that meeting, but both Gilson and Ghannam told Hamameh that Ghannam had invested his share of the funds and would sign the JVA soon. In truth, Ghannam never signed the JVA and never invested in this partnership.

The promised vehicle and mobile home park transactions never closed. On October 26, 2010, Gilson asked Hamameh for an additional \$80,000 to cover back taxes on the mobile home park. In the meantime, Gilson attempted to impress Hamameh by showing off his own high-end

cars and boasting of recent business transactions. Hamameh complained to Gilson repeatedly. In response, Gilson fronted Beaver, whom he described as “a banking executive,” to assure delivery of \$60,000. Hamameh further alleged that Gilson forced another of his scam victims, 83-year-old Michael Conti, to “play along” and by pledging to deliver a \$152,000 check. Gilson and Beaver brought Conti to meet Hamameh and Conti provided the check, but insufficient funds backed it. At another point, Gilson promised to repay part of his debt to Hamameh with two cars and instructed Hamameh to secure the necessary no-fault insurance. Hamameh incurred this expense, but Gilson never delivered the vehicles. Gilson continued this pattern of broken promises, during which Hamameh was sent on various fool’s errands.

Hamameh alleged that Ghannam’s relationship with Gilson fell apart in February 2011. Gilson had previously provided Hamameh rent rolls from the mobile home park their partnership was allegedly purchasing. That property was not actually on the market. Ghannam disclosed that the rent rolls were secured from an insider who worked for the property owner. Ghannam told Hamameh that “Gilson was involved in a similar scam previously and that Gilson was being sued in bankruptcy court. Ghannam further revealed a Craigslist advertisement accusing Gilson of fraud.” Gilson then turned on Ghannam, revealing that Ghannam never signed the JVA or invested in the partnership.

Hamameh asked to be cashed out of the partnership. He believed this was possible because Ghannam and Gilson told him the investment funds were being held in escrow. Hamameh’s refund requests were denied. Gilson later told Hamameh that he had provided the funds to Gilson’s attorney, who in turn had written checks to Ghannam and Beaver.

The first count in Hamameh’s lengthy complaint was based on Gilson’s and Ghannam’s breach of the JVA. Hamameh accused Ghannam and Gilson of breaching their fiduciary duty to him as a copartner in the JVA and sought an accounting of partnership funds. In relation to Ghannam alone, Hamameh charged a breach of fiduciary duty as an investment advisor.

As an alternative to his contract-based claims, Hamameh asserted a promissory estoppel count against Ghannam and Gilson. This claim was based on promises that Hamameh’s money was safe, would be invested as stated in the JVA, and would yield a quick, high return. Hamameh further pointed to Ghannam’s and Gilson’s promise that he could withdraw his investment at any time. These promises were made to induce his investment and his forbearance in protecting himself thereafter, Hamameh alleged. “To avoid injustice,” Hamameh averred, the court was required to “specifically enforce Ghannam’s and Gilson’s promise.”

The bulk of the complaint set forth fraud and misrepresentation claims against Gilson, Ghannam, and Beaver. Hamameh accused Gilson and Ghannam of making various misrepresentations to induce his investment and “to create a false sense of security and faith.” Gilson and Ghannam continued their charade, Hamameh complained, to keep him in the partnership until his funds were siphoned away. They committed silent fraud by withholding information about Gilson’s true character, the real nature of the transactions, and the actual use of Hamameh’s investment funds. Hamameh believed that Ghannam and Gilson intended to “scam” him “[f]rom the onset of the transaction.” Hamameh asserted that he relied upon Ghannam’s advice in relation to the investments because of his position as a Comerica vice president and access to legitimate Comerica investment opportunities. Hamameh alleged that

“Beaver materially assisted Gilson and Ghannam with their fraudulent scheme.” In the alternative, Hamameh accused Ghannam of innocent or negligent misrepresentation. Hamameh similarly accused Ghannam, Gilson, and Beaver of civil conspiracy and concert of action in their plan to defraud him.

In relation to the taking of his \$411,000, Hamameh alleged counts of unjust enrichment, statutory and common-law conversion, and claim and delivery. He further contended that the various transfers of Hamameh’s funds away from partnership business and into the pockets of the individual defendants violated the Michigan Uniform Fraudulent Transfer Act (MUFTA), MCL 566.31 *et seq.*

Hamameh additionally sought exemplary damages, alleging that his victimization under the scam had caused him “to suffer humiliation, embarrassment, loss of reputation, outrage and indignation.”

Hamameh raised a claim for vicarious liability against Comerica Bank, alleging that Ghannam was authorized to act on Comerica’s behalf and acted within the scope of his employment when he presented the investment transaction underlying the JVA to him. Hamameh claimed “[u]pon information and belief,” that this “was not the first time that Ghannam acted in a negligent capacity on behalf of Comerica and/or abused his position with Comerica to his advantage and/or personal gain.” Accordingly, Comerica either knew or should have known of Ghannam’s previous acts or nature. Hamameh also charged Comerica with direct liability for negligent hiring, supervision, and retention of Ghannam.

B. GILSON DEFAULT

Gilson answered Hamameh’s complaint, but quickly stopped defending the proceedings. Gilson cooperated in the entry of a default judgment against him in the amount of \$411,000, trebled to \$1,233,000 pursuant to MCL 600.2919a. Gilson even assisted Hamameh in pursuing a judgment against Beaver, asserting in an affidavit that he transferred funds to Beaver to place a down payment on a bar and to purchase two vehicles, two limousines for a business, a cottage and a pontoon boat. However, Gilson was uncollectable. In addition to filing for bankruptcy, Gilson pleaded guilty to various fraud charges and committed suicide in jail pending sentencing.

C. BEAVER DEFAULT

While the other defendants responded to Hamameh’s complaint, Beaver did not. Hamameh entered a default against Beaver but then waited three months to file a motion to enter a default judgment.

Beaver fought Hamameh’s motion and sought to set aside the default. Beaver contended that he contacted Hamameh’s attorney immediately after receiving the summons. During a subsequent meeting, Hamameh promised to drop the claims against Beaver if he provided information against Gilson. Beaver cooperated and therefore believed the complaint had been dismissed. This amounted to good cause to set aside the default, Beaver argued. In his affidavit of meritorious defense, Beaver asserted that he worked for Gilson’s construction company, simply assisting in remodeling jobs. A year into his employment, Gilson planned to give Beaver \$60,000 to take to Hamameh; however, Gilson never actually provided those funds. Nine

months after that incident, Beaver learned of Gilson's nefarious business transactions and ended their relationship. Beaver alleged that during his meeting with Hamameh, plaintiff's counsel called Gilson who cleared Beaver of any wrongdoing.

Hamameh denied ever promising to drop his lawsuit and reiterated his claims that Beaver had accepted cash and property secured with Hamameh's investment. The circuit court set aside the default, noting, "Well, you guys have a lot of questions of fact in this case."

D. COMERICA SUMMARY DISPOSITION

In the meantime, Comerica filed a motion for summary disposition pursuant to MCR 2.116(C)(8). The basis of the motion was that Ghannam's relationship with Hamameh and Gilson was personal, not related to his bank employment. Hamameh knew Comerica was not involved in the underlying transactions, it argued, because Hamameh had represented Ghannam in a *personal* transaction with Gilson. "Knowing that Ghannam was involved in investment properties outside of his position with Comerica," Hamameh requested Ghannam to inform him of any investment opportunities he "came across." Moreover, Comerica was not mentioned during the investment discussions or in the JVA.

Comerica asserted that Hamameh failed to state a claim for vicarious liability because Ghannam acted outside the scope of his employment to accomplish personal goals. Citing *Zsigo v Hurley Med Ctr*, 475 Mich 215; 716 NW2d 220 (2006), Comerica argued that an employer cannot be held liable simply because the employment affords the employee the opportunity for the challenged tortious activity. In relation to the negligent hiring, retention and supervision claim, Comerica denied that it owed Hamameh any duty.

In response, Hamameh attached an email chain upon which he based his belief that Ghannam was acting on Comerica's behalf. The conversation began on September 22, 2010, when Hamameh contacted Ghannam via Ghannam's Comerica email account regarding his invoice for legal services related to Ghannam's previous deal with Gilson. Hamameh inquired into the success of the transaction. Ghannam's response included a postscript asking, "Are you interested in entering some bank owned/distressed transactions?" Hamameh replied, "I am definitely interested in entering into some bank owned/distressed transactions. Do you have a portfolio I can take a look at?" Ghannam volleyed:

We have a lot of things coming down the pipeline in the near future and when they happen, they happen quick. Immediate access to liquidity is important. I will let you know when something comes up. What size deal range are you looking for?

Hamameh claimed he reasonably believed that Ghannam referred to Comerica-owned distressed properties and that the term "we" referred to the bank.

Hamameh further argued that Ghannam "undertook the responsibility of providing an investment opportunity and advice to Plaintiff, which was within the scope of his employment at Comerica." Comerica's liability stemmed from the reckless or negligent investment advice given by its employee. Hamameh asserted that fact questions regarding Ghannam's intentions and Comerica's negligence precluded summary disposition.

Overall Hamameh argued, “But for Ghannam’s position with Comerica, Plaintiff would have never sought nor relied upon Ghannam’s investment advice and presentment of the underlying opportunity nor invested the sums at stake.” Accepting Hamameh’s allegations as true, as required when a summary disposition motion is filed under (C)(8), Hamameh contended that he stated claims for vicarious liability and negligence against Comerica.

The court conducted a short hearing on Comerica’s motion and dismissed the claims against it. The court found that the claims turned on the JVA and that Ghannam’s emails leading up to that agreement were irrelevant. As the JVA in no way implicated Comerica or Ghannam as a Comerica employee, the court found that no cause of action could be supported.

E. GHANNAM MOTION FOR SUMMARY DISPOSITION

Following partial discovery,¹ Ghannam sought summary disposition pursuant to MCR 2.116(C)(8) and (10). In support of his motion, Ghannam attached an affidavit in which he described that Hamameh knew the underlying transaction with Gilson was a personal deal not connected with Ghannam’s Comerica employment. Ghannam further argued that he was not in a position to make intentional or negligent misrepresentations about Gilson because he had only known him “for a few months” and had engaged in only one transaction with him prior to Hamameh’s introduction. Ghannam denied that he received any proceeds from Hamameh’s investment. Regarding his decision not to sign the JVA, Ghannam averred that he lacked the funds to join the partnership and that Gilson offered to front his investment. Ghannam asserted, “It later became clear that Gilson’s intention was to keep [him] interested in the mobile [home] park transaction at all costs in order to accomplish his fraudulent activities.” Ghannam claimed, “[t]hrough no fault of” his own, “Gilson used [his] positive credibility and reputation to lure and deceive Plaintiff.” Accordingly, Ghannam sought summary disposition of Hamameh’s fraud and misrepresentation claims and any claim for the return of Hamameh’s investment. Ghannam further argued that Hamameh’s contractual and quasi-contractual claims against him had to be dismissed because he was not a signatory to the JVA and never benefitted from it.

In relation to the breach of fiduciary duty claims, Ghannam denied that he owed any such duty to Hamameh. Hamameh unreasonably relied on Ghannam’s Comerica employment as foundation for this claim, negating any fiduciary relationship. Moreover, Hamameh, an educated lawyer, was merely trying to shift the blame because he failed to conduct his own due diligence, Ghannam asserted. Ghannam never held himself out to Hamameh as a financial advisor and “Plaintiff was fully aware that Ghannam’s position with Comerica Bank was in an unrelated International Finance field.”

In response, Hamameh noted Ghannam’s failure to present evidence beyond his affidavit and argued that his own conflicting affidavit created material factual questions. Hamameh asserted that he never knew Ghannam’s exact role at Comerica and again relied on his email conversation with Ghannam to support his belief that the Gilson transaction was connected with

¹ The parties had stipulated to extend the deposition timeframe until 30 days before trial and no such interviews had been conducted at that time.

Comerica. He also cited Ghannam's misrepresentations about Gilson and his own role in the partnership underlying the JVA as evidence that Ghannam acted to defraud Hamameh.

Hamameh argued that Ghannam owed him a fiduciary duty because Hamameh relied on Ghannam's investment advice in his role as a Comerica vice president. Second, Ghannam voluntarily took on the task of introducing Hamameh to Gilson, creating a special duty. As a copartner in the JVA, Hamameh contended, Ghannam owed a fiduciary duty and a duty to disclose in relation to partnership affairs. Ghannam intentionally withheld information about Gilson in violation of this duty. Although Ghannam asserts that he did not know Gilson's true character, Ghannam's credibility is "at stake" and this question must be placed before the jury.

In relation to his conversion claims, Hamameh cited bank records as evidence that Ghannam had taken a 2010 Chevrolet Tahoe from Gilson that was paid for with Hamameh's investment funds. Hamameh also pointed to Gilson's averment that he had transferred some of Hamameh's funds to Ghannam.

On the promissory estoppel claim, Hamameh countered that no contract is required for a promissory estoppel claim. Ghannam made several promises that the transaction would occur as planned and that Hamameh had no grounds to worry. Ghannam also repeatedly promised that he had or would sign the JVA and had or would invest his share in the partnership. These promises induced Hamameh not to take action against Gilson sooner, resulting in Gilson's ability to siphon away Hamameh's funds.

Hamameh finally argued that he was not required to provide direct proof of a formal agreement to succeed on his conspiracy and concert of action counts. Hamameh asserted that "[i]t is without doubt that Ghannam materially aided and abetted Gilson in his fraudulent activity" and "that Ghannam himself engaged in fraudulent activity and other tortious conduct." Ghannam was only one "cohort" used by Gilson to make his transactions appear legitimate.

The court conducted a hearing on Ghannam's motion and ruled, "There's no contract, there's no exchange of money" to support Hamameh's claims. The court determined that the extent of Ghannam's role was to introduce Hamameh to Gilson, and in the court's estimation, this was "a social introduction." And all wrongs were Gilson's doing, the court concluded, not Ghannam's. Accordingly, the court dismissed Hamameh's claims against Ghannam.

F. BEAVER SUMMARY DISPOSITION

Beaver filed a summary disposition motion contemporaneous with Ghannam. Beaver noted that he was mentioned only seven times in Hamameh's voluminous complaint. Based on the complaint and the Gilson affidavit, Beaver argued that it was clear that he made no promises to Hamameh and Hamameh tendered no funds to Beaver. Rather, *Gilson* entered a contract with Hamameh, which Gilson breached, and *Gilson* promised to deliver money through Beaver.

Hamameh responded with a countermotion for summary disposition in which he accused Beaver of acting as Gilson's "front-man." Hamameh cited evidence that Beaver had accepted several large checks from Gilson following Hamameh's investment. In support of his fraud and misrepresentation claims, Hamameh argued that Beaver delayed delivering \$60,000 to him by

“repeatedly” claiming that “he was involved in closings and deal transactions” and therefore too busy to meet with Hamameh, giving the illusion that he was a banking executive.

The circuit court dismissed the claims against Beaver based on the lack of a contract and absence of money transferred directly from Hamameh to Beaver. As a result, Hamameh was left with a million-plus dollar, uncollectable default judgment against Gilson and nothing else. This appeal followed.

II. PREMATURE DISMISSAL OF CLAIMS AGAINST COMERICA

The circuit court prematurely dismissed Hamameh’s claims against Comerica. Hamameh’s allegations that he relied upon Ghannam’s investment advice as a Comerica vice president, that Ghannam used his business reputation to lure Hamameh into the Gilson transaction, and that Ghannam’s misuse of his position was so pervasive that Comerica should have discovered it, if proven, would be legally sufficient to support Hamameh’s claims.

We review de novo a circuit court’s resolution of a summary disposition motion. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.” We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery. [*Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (citations omitted).]

First, Hamameh correctly contends that the circuit court went beyond the proper scope of review for a (C)(8) motion. The court ignored various allegations in the complaint, which had to be accepted as true, and focused solely on the entry of the JVA. The court also made a factual finding inconsistent with the allegations in the complaint that the emails sent by Ghannam did not “have anything to do with his joint venture agreement.” Hamameh alleged that in his pretransaction relationship with Ghannam, he “respected Ghannam’s employment and position as vice president at Comerica, and there was a high level of trust between Ghannam and Plaintiff given these factors.” Hamameh also alleged that he asked Ghannam for investment advice because Ghannam was in a unique position as a bank executive to give sound advice backed by knowledge of and access to legitimate opportunities.

Second, accepting as true the well-pleaded allegations in Hamameh’s complaint, Hamameh stated a legal claim for which relief could be granted on vicarious liability grounds.

The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. . . . This Court has defined “within the scope of employment” to mean “‘engaged in the service of his master, or while about his master’s business.’” Independent action, intended solely to further the employee’s individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer’s instructions,

liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. [*Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011) (citations omitted).]

However, an employer cannot be found liable simply because the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority" or where the employee merely "was aided in accomplishing the tort by the existence of the agency relation." Such vicarious liability is not recognized in Michigan. *Zsigo*, 475 Mich at 223, 226.

In this case, Hamameh ultimately may be unable to establish respondeat superior liability based on the evidence. However, the court relied solely on the complaint in dismissing this claim and based on the complaint, dismissal was premature. Hamameh alleged that "Ghannam acted within the scope of his employment on behalf of Comerica or purported to act on behalf of Comerica and within his capacity as a Comerica executive and/or officer" in providing investment advice and presenting the underlying investment opportunity. Hamameh continued that Ghannam was functioning in his role "as a banking professional and officer of Comerica, and within the scope and furtherance of Comerica's business by offering Plaintiff investment advice and an investment opportunity on behalf of Comerica, as Plaintiff was led to believe."

In support of the allegation that Ghannam was acting within the scope of his employment, Hamameh alleged that he approached Ghannam as "a banking professional and vice president at Comerica, for investment advice and informed Ghannam of his interests in various investment opportunities." Hamameh continued:

Plaintiff believed that Ghannam had access to various investment opportunities and would be able to provide sound investment advice due to Ghannam's banking position with Comerica. Plaintiff also believed that Ghannam would have access to legitimate transactions given that position, that Ghannam would have knowledge of, information regarding and access to those potential transactions, and that Ghannam was qualified to give sound investment advice given his professional background and position with Comerica.

The introduction to the Gilson transaction began under the guise of a legitimate Comerica-backed investment, Hamameh asserted. Ghannam used his Comerica email account to query whether Hamameh was interested in bank-owned/distressed properties, leading Hamameh to believe that Ghannam was referring to Comerica-owned properties. Ghannam followed this message with the note, "We have a lot of things coming down the pipeline," suggesting that "we" meant Comerica. Taking these allegations as true, as required when reviewing a (C)(8) motion, the circuit court was bound to deny Comerica's motion.

The circuit court also erred in summarily dismissing Hamameh's direct liability claim against Comerica. In *Zsigo*, 475 Mich at 227, our Supreme Court held that "employers will continue to be subject to liability for their negligence in hiring, training, and supervising their employees." See also *Cox v Bd of Hosp Managers for the City of Flint*, 467 Mich 1, 11; 651 NW2d 356 (2002). As with any negligence action, a plaintiff claiming negligent hiring, supervision or retention must establish four basic elements: 1) a duty, 2) a breach of that duty, 3) proximate causation, and 4) damages. See *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313

(2007). Whether a duty exists is generally a question of law for the trial court. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

An employer may be held directly liable for its employee's tortious or illegal conduct when it knew or should have known of the employee's propensities. See *Millross v Plum Hollow Golf Club*, 429 Mich 178, 196-197; 413 NW2d 17 (1987). This is especially true when the employer is aware of past acts of such conduct and yet hires or retains the employee. See *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). Accepting as true the allegations in Hamameh's complaint, Comerica knew or should have known that Ghannam had a tendency to defraud Comerica customers. Comerica had a duty to use care in selecting employees that would not defraud its customers. *Id.* at 412-413. As noted throughout the complaint, Ghannam had risen to the position of vice president. During that time, Comerica had monitored Ghannam's conduct. "Upon [Hamameh's] information and belief, Comerica monitor[ed] its employees' emails to ensure work-related activity."

Hamameh also alleged that "the underlying transaction with Plaintiff was not the first time that Ghannam acted in a negligent capacity on behalf of Comerica and/or abused his position with Comerica to his advantage and/or personal gain." Hamameh recited that Gilson and Ghannam had used Ghannam's banking position to defraud 83-year-old Michael Conti out of \$3.9 million. Hamameh also alleged that Ghannam "confirmed" that Gilson had delivered to him the closing documents for the sale of a mobile home park. Hamameh alleged that Ghannam told him that he had given those documents to a Comerica CPA for review.

These allegations, if proven, could establish a pattern on Ghannam's part of underhanded dealing while in his role as a Comerica vice president. It appears from the complaint that Ghannam may have defrauded Conti under Comerica's nose. Ghannam also used Comerica to give credence to false transactions created by Gilson. If discovery revealed that Ghannam's activities at Comerica rose to a level that Comerica should have noticed, Comerica could be found liable for its failure to discover and to take action. Accordingly, the circuit court improperly dismissed Hamameh's direct negligence claim against Comerica at such an early stage in the proceedings. Accordingly, we vacate the dismissal of Hamameh's claims against Comerica under MCR 2.116(C)(8) and remand for further proceedings.

III. SETTING ASIDE THE DEFAULT AGAINST BEAVER WAS PROPER

Hamameh also challenges the circuit court's decision to set aside the default entered against Beaver. We review for an abuse of discretion a trial court's decision to set aside a default. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). A trial court abuses its discretion when its decision "is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The court did not abuse its discretion in this case because Beaver established good cause and a potential meritorious defense in support of his motion.

While "the law favors the determination of claims on the merits," Michigan courts must also be hesitant to set aside properly entered defaults or default judgments. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). A court may only set aside a default when the defendant establishes "good cause," i.e., a reasonable excuse for the

failure to answer, and presents “an affidavit of facts showing a meritorious defense” MCR 2.603(D)(1); *Saffian*, 477 Mich at 14.

“To show ‘good cause,’ a party may establish ‘(1) a substantial defect or irregularity in the proceeding upon which the default was based,’ or ‘(2) a reasonable excuse for failure to comply with the requirements which created the default’” *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 95; 666 NW2d 623 (2003), quoting *Alken-Ziegler*, 461 Mich at 230. In deciding whether good cause exists, the court may consider “the circumstances behind the failure to file or file timely” an answer. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008).

Here, the circuit court accepted the truth of Beaver’s affidavit that Hamameh offered to drop his lawsuit if Beaver gave evidence against Gilson. As Beaver had provided information about his codefendant, he believed the lawsuit would be dismissed and an answer was unnecessary. The court rejected Hamameh’s challenges to the factual accuracy of the affidavit. A decision to set aside a default is based on the “totality of the circumstances” and is “fact-intensive.” *Id.* at 236. Ruling in this case necessarily required the court to decide whether to believe Beaver’s reasons for failing to file an answer. We give great deference to a circuit court’s resolution of such credibility issues within affidavits. See *Woods v SLB Prop Management, LLC*, 227 Mich App 622, 628-629; 750 NW2d 228 (2008). The circuit court accepted Beaver’s version of events and we must defer to that decision. And the promise of dismissal in exchange for cooperation certainly amounts to good cause not to file an answer.

When considering whether an affidavit sets forth a meritorious defense sufficient to support setting aside a default, a circuit court may consider whether:

- (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
- (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
- (3) the plaintiff’s claim rests on evidence that is inadmissible. [*Shawl*, 280 Mich App at 238.]

In his affidavit, Beaver averred that he never possessed the \$60,000 that Gilson promised Beaver would deliver to Hamameh. Although Beaver did not specifically disclaiming acting as a funnel for Gilson’s ill-gotten gains, he implied such a denial. Beaver alleged that he merely assisted Gilson in his construction work, and that he severed his connection with Gilson when he discovered his true character. Moreover, Beaver alleged that Hamameh made a secret three-way call with Gilson in Beaver’s presence and during that call, Gilson absolved Beaver of any liability for wrongfully possessing Hamameh’s money. If these allegations were proven, they would be a strong defense to any claim that Beaver lied to Hamameh or retained any of Hamameh’s funds. Accordingly, the circuit court acted within its discretion in setting aside the default and refusing to enter a default judgment.

IV. ERRONEOUS DISMISSAL OF CLAIMS AGAINST GHANNAM

Hamameh also challenges the circuit court's summary dismissal of his claims against Ghannam based on MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." [*Zaher*, 300 Mich App at 139-140 (citations omitted).]

The evidence amassed during discovery created factual questions regarding Ghannam's intent, the veracity of his statements, and whether he retained any spoils from the scam perpetrated upon Hamameh, precluding summary disposition on the majority of Hamameh's claims.

Ghannam has always asserted that he never created the impression that the Gilson-Hamameh transaction was undertaken in his role with Comerica. The email trail, however, calls that statement into question. In a September 14, 2010 email related to the Ghannam-Gilson transaction in which Hamameh served as counsel, Ghannam informed Hamameh:

Separate note, my bank does have some property for sale. 8 vacant lots connected to a newer condo association in Dearborn (maybe heights?). I can get more information for you if you're interested. Asking price is \$50,000 (\$6,250 per lot). Let me know. Feel free to call my office line during work hours.

Ghannam followed up this message beginning on October 18, when he asked Hamameh via email whether he was interested in "bank owned/distressed transactions" and indicated that "We have a lot of things coming down the pipeline in the near future." These messages could reasonably be interpreted as inviting Hamameh to purchase Comerica-owned properties, offered by Ghannam in his role as a Comerica vice president.

Ghannam denies that he told Hamameh that he signed the JVA or invested in the transaction. This statement is contradicted by the evidence as well. In a November 24, 2010 text message, Ghannam expressly misrepresented that he had signed the JVA:

[Hamameh]: Good morning. Did you ever sign a joint venture agreement given to you by Mark when we all started this process?

[Ghannam]: Yes, why?

Moreover, in late February 2011, Steve George, an attorney and mutual friend of Ghannam and Hamameh, offered to act as an intermediary. In an affidavit, George swore that Ghannam stated

his confidence in Gilson as a business man and indicated “that he had at risk his own investment in the same deal that Mr. Hamameh was involved with.” George averred that in later conversations, Ghannam “made it very clear that he had information” regarding the Gilson deal of which Hamameh was unaware and would share that information “only under the condition that Mr. Hamameh agree to refrain from seeking legal action against him.”

As evidence that Ghannam actually vouched for Gilson’s ability to get the deal done, in a December 9, 2010 text message, Ghannam indicated that he had “[m]ade some phone calls” and that “[a]lls good. . . . promise.” In relation to fellow victim Conti’s supposed intent to pay Hamameh, Ghannam indicated in a December 10 message, “Don’t worry it will happen.”

Hamameh stated in his affidavit that Gilson promised to repay him and Ghannam in part with vehicles. One such promise involved Chevrolet Tahoes. In text messages on December 27, Ghannam referenced a truck that he was picking up the next day. Hamameh responded that he was “[g]lad something came through for [you].” Ghannam queried, “Anything for u? LMAO.” Hamameh responded, “Ya.....Nothing! Lol.” Ghannam returned, “we’re getting there. I promise u.” Ghannam’s story about how he received the Tahoe changed throughout the proceedings. In answer to an interrogatory, Ghannam asserted that he took possession of the truck in January 2011, from dealer Todd Cowan at Brighton Ford. Ghannam indicated that he paid \$22,000 for the vehicle, along with his trade in of a Jeep for \$8,000. In a later response, Ghannam admitted that Gilson arranged the transaction but claimed that he provided the funds to Gilson to purchase the truck. In a supplemental response to the second set of interrogatories, Ghannam gave the following story:

On or about October, 2010, Mark Gilson approached . . . Ghannam about purchasing additional properties in Wyandotte. Given the successful closing of the previous transaction with Gilson, Ghannam agreed to the terms and put on deposit with Gilson the sum of \$22,000. By December, Ghannam questioned Gilson on when the transaction would materialize and Gilson suggested that if Ghannam was in a hurry, Gilson could arrange for the purchase of a Chevy Tahoe instead, which would be much quicker. Gilson instructed Ghannam to go to Brighton Ford and see how much they would give him as a trade on his Jeep Liberty and he would taker [sic] care of the rest. On or about December 20, 2012, Ghannam finalized the deal with Brighton Ford. The vehicle was delivered to Ghannam’s home, and the trade in was taken from his home. To Ghannam’s knowledge, the remaining funds were paid by Gilson, although he never saw the exchange of money between the parties.

Given that Gilson wrote two separate checks for \$10,000 to Brighton Ford on January 4 and April 4, 2011, and a check to Todd Cowan for \$10,000 on May 13, 2011, it appears that Ghannam’s final version of events regarding Gilson’s payment for his vehicle is the most accurate. This evidence clearly shows that Ghannam lied to Hamameh, George, and the court early in discovery.

As further evidence that Ghannam benefitted from Hamameh’s investment, Gilson showed Hamameh his bank statements from October through December 2010. Gilson

highlighted various cash withdrawals, which he asserted that he gave to Ghannam. These included \$41,467.84 in cash in October, and \$80,000 in cash in December.

Ghannam also has continually asserted that he had engaged in only one transaction with Gilson before the current deal and that he had no preexisting concerns about Gilson's business. Hamameh presented an email between from Ghannam to Gilson proving that Ghannam already had concerns about Gilson's integrity before he introduced Hamameh to Gilson and that Ghannam and Gilson had engaged in more than one transaction:

We started working on the lawn maintenance transaction in late July. I agreed to do the 2nd (car) transaction in mid-August. Its now September and I've got nothing from you that was agreed. This also includes payment from the maintenance contract that was due or the warehouse space that you agreed to in good spirit. I'm not going to dwell on what has (or really hasn't) happened over the past month and a half, but we do need to address this pretty quickly.

. . . [B]usiness is business. I know you're always busy and I know your intentions are good, but I think you know communications and execution has been pretty poor. . . . [M]y faith in someone has time limits and with runaround communications (i.e. ready to pull cars tonight; I'll call you in a few; we'll meet up today; we have everything; ready for release), it doesn't work for me. No offense, but I don't do business by waiting for phone calls or by things not coming through.

So, here's where I am at. I still want to do business with you. . . . But, if we can't get these transactions done by this Wednesday, you're gonna need to cash me out of both this Thursday. . . . Still would consider cash at closing transactions with you in the future. Or, we get this deal done (and we build some value), I'll have no problems fronting some cash for another transaction. . . .

This message reveals that Ghannam had been involved in not only a real estate transaction with Gilson, but also some sort of car deal.

In addition to the hard evidence, Ghannam and Hamameh provided conflicting affidavits outlining their versions of events. The evidence therefore created many questions that had to be resolved by the trier of fact. And these factual questions were material as they directly related to the elements of several counts against Ghannam as outlined below.²

² Hamameh complains that Ghannam sought only a partial summary disposition of his complaint. A quick review of Ghannam's motion belies that claim.

A. PROMISSORY ESTOPPEL AND CONTRACT-BASED CLAIMS

We start with Hamameh's promissory estoppel claim, because this was the theory by which Hamameh wished to hold Ghannam accountable under the contract.

In order to invoke promissory estoppel, the party relying on it must demonstrate that (1) there was a promise, (2) the promisor reasonably should have expected the promise to cause the promisee to act in a definite and substantial manner, (3) the promisee did in fact rely on the promise by acting in accordance with its terms, and (4) and the promise must be enforced to avoid injustice. [*Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 548-549; 619 NW2d 66 (2000).]

Promissory estoppel developed to protect the ability of individuals to trust promises in circumstances where trust is essential. It is the value of trust that forms the basis of the entitlement to rely. However, the reliance interest protected by § 90 [of 1 Restatement Contracts 2d] is reasonable reliance, and reliance is reasonable only if it is induced by an actual promise. [*State Bank of Standish v Curry*, 442 Mich 76, 83-84; 500 NW2d 104 (1993) (quotation marks and citations omitted).]

“[A]lthough the elements required to invoke the doctrine are straightforward, they necessarily involve a threshold inquiry into the circumstances surrounding both the making of the promise and the promisee's reliance as a question of law. The existence and scope of the promise are questions of fact. . . .” *Id.* at 84.

Hamameh alleged that Ghannam promised he was going to and had signed the JVA and personally invested over \$400,000 in the partnership. Hamameh also presented evidence (a text message and George's affidavit) that Ghannam made this promise. This was the sort of “definite and clear” promise necessary to establish a promissory estoppel claim. *Id.* at 85. Therefore, although it is generally a question of law whether a promise was made, the evidence here created a question of fact on this element that would have to be resolved by the jury.

Hamameh and Ghannam created a credibility contest about the second element, reliance, which is also generally a legal issue. Hamameh averred that he told Ghannam that he was placing his trust in Ghannam's faith in Gilson and was investing because he knew Ghannam was similarly putting himself on the line, while Ghannam swore that he told Hamameh to conduct his own due diligence. Hamameh presented evidence that his reliance was reasonable given the quick turnaround of the investment and the particular relationships of the three parties. Hamameh did invest and sign the JVA, and created a question of fact on the third element with his claim that he did in fact rely on Ghannam's promise in doing so.

The injustice caused by Ghannam's breaking his promise is that Hamameh lost his ability to challenge Ghannam's breach of the JVA. It also negated Hamameh's grounds to demand an accounting from Ghannam as a partner to the JVA or to claim that Ghannam breached his fiduciary duty as a member of the partnership. As a result, the circuit court properly dismissed the breach of contract, accounting and fiduciary duty claims. As this resulted in manifest

injustice, however, the remedy is to determine whether Hamameh would have been entitled to damages for breach of contract or fiduciary duty had Ghannam signed the document, and to order Ghannam to produce an accounting in equity.

B. FRAUD AND MISREPRESENTATION

In Counts II through VI of the complaint, Hamameh alleged fraud, silent fraud, and fraudulent, negligent and innocent misrepresentation. The evidence uncovered during discovery and competing versions of events raised triable issues on these counts.

Common to these counts is that Ghannam misrepresented that he signed the JVA and invested money, that Gilson was a trustworthy business man, that Ghannam had engaged in only one prior and successful deal with Gilson, and that the Gilson deal would go through. Ghannam also withheld information about his prior dealings with Gilson, about Gilson's purchase of a truck for him, and about the banks and individuals involved in the underlying transactions.

In relation to Hamameh's fraudulent misrepresentation and fraudulent scheme counts, Hamameh had to prove the elements of a general fraud claim:

(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998) (quotation marks and citations omitted).]

Not all misrepresentations are intentional, however. Hamameh alternatively alleged that Ghannam was liable for innocent misrepresentation. A plaintiff need not establish a defendant's knowledge of the representation's falsity to succeed on such a claim. See *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 38-39; 761 NW2d 151 (2008). Hamameh further accused Ghannam of negligent misrepresentation. "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Barclae v Zarb*, 300 Mich App 455, 476; 834 NW2d 100 (2013). Silent fraud does not involve an affirmative misrepresentation. Rather, it involves "the suppression of a material fact." *M & D*, 231 Mich App at 28-29 (quotation marks and citation omitted). To prove a claim of silent fraud, in addition to the elements of a general fraud claim, the plaintiff must establish that the defendant (1) suppressed the truth using some type of false and misleading words or actions, (2) with the intent to defraud or deceive, (3) while having a duty to disclose. *Barclae*, 300 Mich App at 477-478. Notably, all claims of fraud and misrepresentation have an underlying reasonable reliance element. See *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005) (holding that the plaintiff had to "show that any reliance on defendant's representations was reasonable").

The evidence outlined above clearly creates factual questions that Ghannam withheld information from Hamameh and lied to him. He lied and omitted information about Gilson,

himself, and the partnership transaction. These misrepresentations were material as they induced Hamameh to invest over \$400,000. The evidence also placed Ghannam's motive and knowledge at question.

Hamameh further created a question of fact on the issue of reasonable reliance. He alleged that he relied on Ghannam's statements in deciding to enter the transaction. Hamameh also presented enough evidence to create a factual question that this reliance was reasonable.

[A]lthough the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements, *none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence. Stated differently, these doctrines do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud.* [*Titan Ins Co v Hyten*, 491 Mich 547, 557; 817 NW2d 562 (2012) (citations omitted, emphasis added).]

Hamameh accepted the word of someone who claimed to have completed a financially successful deal with Gilson. The evidence implies that Ghannam and Gilson brought Hamameh in as Ghannam's attorney in that deal for the purpose of roping him in. Hamameh was thereby shown a snapshot to make him believe in the financial viability of deals with Gilson. This is sufficient under *Titan Ins Co* to create a question of fact on reasonable reliance.

Hamameh also presented evidence that Ghannam owed a duty to him.

In determining whether a duty exists, courts look to different variables, including: foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. [*Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996).]

Ghannam was in a position of greater knowledge and withheld information to encourage Hamameh to part with his money. Ghannam was a bank vice president with an air of intelligence in financial matters. Ghannam used this relationship to introduce Hamameh to Gilson, a result not specifically anticipated or requested by Hamameh.

Accordingly, based on the evidence, the circuit court should not have summarily dismissed any of Hamameh's fraud or misrepresentation counts.

C. BREACH OF FIDUCIARY DUTY (Investment Advice)

Hamameh raised two counts of breach of fiduciary duty against Ghannam: one based on the investment advice given in Ghannam's role as a financial advisor and one based on his partnership role under the JVA. As noted above, Ghannam did not sign the JVA, even though he lied and told Hamameh that he had. As he was not a partner, Ghannam could not owe a duty to Hamameh under the partnership and the court properly dismissed that count.

To establish a fiduciary duty pertaining to Ghannam's role as a Comerica financial advisor to a Comerica customer, Hamameh would have to show:

[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) *when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship*, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. [*Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 20; 824 NW2d 202 (2012) (quotation marks and citations omitted, emphasis added).]

Although there is no generally recognized fiduciary duty between a financial advisor and his client, this does not prevent the creation of a fiduciary relationship under the right facts. Here, there is a credibility contest regarding whether Hamameh approached Ghannam in his role as a financial advisor at a major banking institution. Ghannam claims that his Comerica role involved no component of financial advising. Hamameh counters that he was unaware of Ghannam's exact position but assumed it involved investments given Ghannam's transactions and willingness to provide advice about Comerica-backed investment opportunities. If the fact finder believes that Ghannam and Hamameh had a relationship of financial advisor and client, then the financial advice given within that relationship would have to be true or at least reasonably researched. Accordingly, Hamameh met his burden to overcome Ghannam's (C)(10) challenge to this count.

D. WRONGFUL RETENTION OF HAMAMEH'S FUNDS

Hamameh's evidence proved that he invested \$411,000 and that those funds were not returned or invested on behalf of the partnership. Seeking the return of his funds, Hamameh alleged unjust enrichment, claim and delivery, statutory and common-law conversion, and violation of the MUFTA. Hamameh created a triable question in relation to these counts. "Unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (quotation marks and citation omitted). To hold that a third party has been unjustly enriched under another's contract, a plaintiff must show that the third party somehow misled the plaintiff. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 24; 831 NW2d 897 (2012).

Claim and delivery is defined by court rule as a "civil action to recover . . . goods or chattels which have been unlawfully taken or unlawfully detained." MCR 3.105(A)(1). In bringing a claim and delivery action, the plaintiff must "specifically describe the property claimed" and its value, as well as "the nature of the claim and the basis for the judgment requested." MCR 3.105(C).

Statutory conversion is governed by MCL 600.2919a, which provides treble damages when a defendant steals, embezzles, or converts a plaintiff's property or accepts such property with the knowledge it was so converted. "Common law conversion . . . consists of any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010) (quotation marks and citation omitted). The MUFTA proscribes fraudulent transfers to insiders to avoid a debt. MCL 566.34.

There is no question that Hamameh's funds were wrongfully taken, not used for their proper purpose, and were not returned. Factual questions remain where the money went and who took possession of it. Gilson presented his bank records and swore that he transferred \$121,467.84 from Hamameh's investment to Ghannam. Ghannam also eventually admitted that Gilson purchased a truck for him after Hamameh invested \$411,000. This evidence generates a factual question whether the funds to purchase the truck came from Hamameh's investment. Given that Ghannam induced Hamameh to invest nearly half a million dollars and that Hamameh would never see the fruits of that investment, a fact question exists as to whether Ghannam's acceptance of the truck and possibly cash was inequitable. And there are questions of fact whether these transfers were made to defraud Hamameh out of the return of the investment, in violation of the MUFTA. Accordingly, the circuit court should not have dismissed these claims.

E. CONSPIRACY

Hamameh raised claims of concert of action and civil conspiracy against Ghannam in conjunction with Gilson and Beaver. A "civil conspiracy" is "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013). To prove a concert-of-action claim, a plaintiff must additionally prove "that all defendants acted tortiously pursuant to a common design" that caused harm to the plaintiff. *Id.*

The contradicting affidavits and evidence precluded summary disposition of these counts. Beaver, Gilson, and Ghannam all presented affidavits shifting the blame onto the others. If any one of their stories is believed, at least two people were involved in the underlying scheme. It has been clearly established that at least Gilson was involved in a fraudulent scheme—the Fox 2 News report and criminal plea resulted from his course of conduct. Hamameh presented evidence connecting Ghannam to that scheme. Ghannam lied about his prior dealings with Gilson, talked up Gilson to encourage Hamameh's investment, continually reassured Hamameh about the transaction so that Hamameh did not assert his right of refund sooner, later admitted to George that he possessed additional information that he would not share with Hamameh until he received a release of liability, and received at least a truck and maybe over \$100,000 from Hamameh's investment. The circuit court was out of bounds in summarily dismissing these factually supported claims.

F. EXEMPLARY DAMAGES

Hamameh sought exemplary damages for "humiliation, embarrassment, loss of reputation, outrage and indignation." Such damages are permissible in intentional tort cases.

B&B Investment Group v Gitler, 229 Mich App 1, 9-10; 581 NW2d 17 (1998). However, Hamameh presented no evidence during discovery of his losses due to humiliation and embarrassment or the affect on his reputation. In the face of a (C)(10) motion following discovery, a plaintiff cannot rely on his mere allegations to support a claim. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006), citing MCR 2.116(G)(4). The circuit court properly dismissed this count.

Accordingly, we affirm the summary dismissal of Counts I Breach of Contract, VII Exemplary Damages, XIII Breach of Fiduciary Duty (partnership), and XVI Accounting. However, we vacate the summary dismissal of Counts II Fraud and Misrepresentation, III Fraud/Fraudulent Scheme, IV Innocent Misrepresentation, V Negligence and Negligent Misrepresentation, VI Silent Fraud, VIII Unjust Enrichment, IX Claim and Delivery, X Statutory Conversion, XI Common-Law Conversion, XII Breach of Fiduciary Duty (investment advisor), XIV Concert of Action, XV Civil Conspiracy, XVII Promissory Estoppel, and XX Violation of the MUFTA. Hamameh created genuine issues of material fact that must be resolved by a jury and we therefore remand for further proceedings.

V. ERRONEOUS DISMISSAL OF CLAIMS AGAINST BEAVER

The circuit court additionally summarily dismissed Hamameh's claims against Beaver for failure to create a genuine issue of material fact. This was error. Although the evidence uncovered against Beaver was not as strong as that against Ghannam, Hamameh still created triable questions of fact that Beaver was involved in the scheme to pull Hamameh into a fraudulent investment deal and retained some proceeds from that transaction.

Hamameh presented a series of checks written to Beaver following Hamameh's investment. Over a three-month period, Gilson paid Beaver over \$20,000, a potentially excessive amount in light of Beaver's claim that he only assisted Gilson in home remodeling jobs. Following Hamameh's investment, Gilson made a down payment of \$10,000 on a deal to purchase a bar on Beaver's behalf. When that transaction fell through, Beaver apparently retained the funds. Hamameh presented a check that Beaver wrote to LTD Investment Group for \$40,000. This figure exceeded Beaver's means as described by Beaver himself. Hamameh also averred in his affidavit that Gilson accused Beaver of possessing some of the proceeds from Hamameh's investment. Gilson corroborated that statement in his affidavit. Hamameh created a credibility contest regarding the source of the \$60,000 that Beaver was to deliver to Hamameh during the transaction. Beaver claimed that he never received the \$60,000 to give to Hamameh, while Gilson swore that the \$60,000 was in Beaver's possession.

Although Beaver downplays the allegations leveled against him in the complaint, those averments give rise to a colorable claim. In the common factual allegations, Hamameh accused Beaver of being involved in the use of Conti, Hamameh's fellow victim, to lull Hamameh into not exercising his legal rights sooner. Hamameh alleged that Beaver was one of the "cohorts/co-conspirators" used by Gilson "to create the impression that his dealings were legitimate." On Gilson's behalf, Beaver contacted Hamameh and promised to deliver \$60,000. Hamameh asserted that Gilson told him during a July 15, 2011 telephone conversation and July 21, 2011 text message that Beaver was "in possession" of Hamameh's money. Gilson allegedly told

Hamameh that Lisa Fuller took \$105,000 in Hamameh's proceeds from Beaver in connection with the Oscoda land deal.

Yet, we agree with Beaver's assessment that Hamameh did not raise as many counts against him as he now tries to portray. Hamameh directly alleged a claim against Beaver for fraudulent scheme. Hamameh asserted in this regard that Beaver "materially assisted" his fellow defendants "with their fraudulent scheme by partaking in the making of false promises to Plaintiff for the delivery of money" and in "convincing Plaintiff that the scam . . . was a legitimate transaction." Hamameh also raised concert of action and civil conspiracy claims against Beaver. In relation to the MUFTA violation claim, Hamameh described Beaver as a debtor and an insider under the act. Hamameh alleged that Gilson placed various assets in Beaver's name to defraud Hamameh.

Although the counts are fewer in number and the evidence more sparse, Hamameh did create triable questions of fact that should have been sent to a jury. There is a question regarding Beaver's credibility. The checks create a question whether Beaver benefitted financially as a result of Hamameh's investment. The unsuccessful bar deal creates a specter that a fraudulent transaction occurred. Beaver's presence during the Conti incident creates an inference that he was some sort of enforcer in the schemes. Ultimately, the questions revolve around credibility and should not have been decided summarily. Accordingly, we vacate the summary dismissal of Hamameh's claims against Beaver.

We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Deborah A. Servitto

/s/ Amy Ronayne Krause